(2)

No. 90-830

FILED

JAN 25 1991

JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1990

---

BELL ATLANTIC CORPORATION

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

JOHN G. ROBERTS, JR.
*Acting Solicitor General*
JAMES F. RILL
*Assistant Attorney General*
ALISON L. SMITH
*Deputy Assistant Attorney General*
CATHERINE G. O'SULLIVAN
ANDREA LIMMER
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the lower courts correctly interpreted the AT&T consent decree to preclude petitioner, a Bell Operating Company, from providing a "gateway" service linking a customer in one telephone exchange area to a computer in another exchange area without a waiver of the provision of the decree prohibiting the Bell Operating Companies from providing interexchange telecommunications services.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

# In the Supreme Court of the United States

OCTOBER TERM, 1990

---

No. 90-830

BELL ATLANTIC CORPORATION

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 907 F.2d 160. The opinion of the district court (Pet. App. 11a-21a) is reported at 1989-1 Trade Cas. (CCH) ¶ 68,400.

### JURISDICTION

The judgment of the court of appeals was entered on June 12, 1990. A timely petition for rehearing was denied on August 28, 1990. Pet. App. 23a-24a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. The 1982 consent decree that terminated the United States' antitrust suit against AT&T required AT&T to divest its 22 Bell Operating Companies (BOCs). Pet. App.

25a-43a; *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982), aff'd mem. *sub. nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). The object of the divestiture was to eliminate AT&T's incentive and ability to use its control of the local exchange monopolies to impede competition in the interexchange (long distance) telecommunications market and the telecommunications equipment market. The decree also placed restrictions on the separated BOCs, which now operate the local exchange monopolies. Among other restrictions, the decree provided that no BOC shall "provide interexchange telecommunications services or information services." Section II(D)(1), Pet. App. 28a.

In orders issued in 1987 and 1988, the district court modified some of the decree's line of business restrictions. In particular, the court modified the restriction on the provision of information services to permit the BOCs to provide "gateways" to an information service provider. See Section VIII(K)(1) (Pet. App. 38a); *United States* v. *Western Electric Co.*, 673 F. Supp. 525, 591-592 & nn. 297, 300 (1987), modified, 714 F. Supp. 1, 5-7 (D.D.C. 1988), rev'd in part on other grounds, 900 F.2d 283 (D.C. Cir. 1990), cert. denied, No. 90-9 (Oct. 9, 1990). "Gateway services" include "a variety of functions designed to foster interconnection between consumers and information providers." Pet. App. 4a. The gateway service at issue, for example, would allow customers with computers to contact a central processor that would list information services that are available over the telecommunications network and would interact with customers to provide information about the services. Although the BOCs had also requested removal of the prohibition on their provision of interexchange services, the court denied that motion (673 F. Supp. at 552, 562, 567, 602), and the court of appeals affirmed that refusal (900 F.2d at 300-301).

MCI moved the district court to "clarify" its order modifying the information services restriction to make clear that it did not undermine the decree's restriction on BOCs' providing interexchange services. Petitioner Bell Atlantic, a Bell Operating Company, opposed the motion for clarification, stating that "[t]he Court has been quite clear that it has not modified the interexchange prohibition, and no further clarification is required." C.A. App. 266. In denying the motion for clarification, the district court stated that it "did not modify the interexchange prohibition of the decree when it allowed [BOC] participation in the transmission of information services," and noted that "there does not appear to be any confusion on this point." *United States* v. *Western Electric Co.*, 690 F. Supp. 22, 28 (D.D.C. 1988).

Petitioner nevertheless subsequently moved for a declaratory ruling that a gateway system it planned to implement on a trial basis in Pennsylvania would not violate the decree.[1] Petitioner proposed to connect gateway equipment in each of five Pennsylvania local exchange areas (known as LATAs[2]) to one central gateway processor located in Philadelphia. A customer in any of the five LATAs would dial a local telephone number to reach a "protocol agile packet assembler-disassembler" (PAP) located in his

[1] Petitioner did not request, in the alternative, a waiver of the decree prohibition. Section VIII(C) of the decree specifically provides for waivers of the decree's line of business prohibitions upon a showing that there is no substantial possibility that a BOC could use its monopoly power to impede competition in the market it seeks to enter. Pet. App. 36a.

[2] Because the term "exchange area" had long been used by state regulators to mean something different from what the term means in the AT&T consent decree, the parties agreed after the decree was entered to use "LATA" (local access and transport area) as a synonym for "exchange area." *United States* v. *Western Electric Co.*, 569 F. Supp. 990, 993-995 & n.9 (D.D.C. 1983).

LATA. The PAP would connect the customer to the central processor in Philadelphia over a private circuit owned or leased by petitioner. The central processor would then send the customer's computer an introductory "welcoming" screen and a list of information service providers (ISPs). The customer would be able to search the central processor's files to obtain additional information, including listings of providers of particular services, descriptions of those services, and information about the cost of the services. Pet. App. 5a, 12a-13a & n.8. If the customer elected to use the services of an ISP, the central processor would provide the PAP with the necessary information and the PAP would connect the customer to the ISP. In the case of an ISP not located in the customer's LATA, the call would be routed to an interexchange carrier selected by the ISP. C.A. App. 272, 290.[3]

A customer subscribing to petitioner's gateway information service would receive a bill for the total charge attributable to the gateway service. There would be no separate charge listed on the bill for the connection between the customer and the central processor. The single charge for the gateway service would vary according to the duration of that connection, however. Pet. App. 5a, 18a.

2. The district court denied petitioner's motion, holding that the proposal would violate the interexchange prohibition of the decree in the absence of a waiver. Pet. App. 11a-21a. The court noted that "[i]n every significant respect, it would be the central, multi-LATA processor, not the local PAP, that would be the information services gateway" and "that the information and the services at the heart of the gateway service would be provided by that processor [which] may be located in an entirely different LATA than the customer * * * and would perform its

[3] Petitioner does not claim the authority to connect a customer directly to an ISP in another LATA.

functions on an interLATA or interexchange basis." *Id.* at 14a-15a. The court found the conclusion "inescapable that the gateway architecture [petitioner] is proposing would operate on an interexchange basis, and that it would therefore constitute an interexchange service prohibited by section II(D)(1) of the decree." *Id.* at 15a.

The district court rejected petitioner's contention that the gateway service at issue was analogous to "directory assistance" for local telephone service, which the BOCs are permitted to provide across exchange boundaries through an "official services" network. Pet. App. 15a-19a; see *United States* v. *Western Electric Co.*, 569 F. Supp. 1057 (D.D.C. 1983), aff'd *sub nom. California* v. *United States*, 464 U.S. 1013 (1983) (*Official Services*) (partially reproduced at Pet. App. 44a-52a). The court explained that its 1983 decision sanctioning centralized official services was part of the process of reorganizing the AT&T system to separate the local telephone exchanges from the long distance network. It held that the preexisting official services network was "an inherent part of the provision of exchange communications" by a BOC and that it need not be redesigned after divestiture. *Id.* at 16a-17a. Bell Atlantic's gateway proposal, on the other hand, involved the establishment of a new competitive service on an interexchange basis. *Id.* at 18a.

Moreover, the court explained, although the gateway service would permit a customer to obtain access to an information service provider, it was not analogous in nature to simple directory assistance. Gateway subscribers would interact extensively with the central processor and would be charged according to the time they were connected to it. Pet. App. 18a-19a. Thus, the court concluded, petitioner's new service was more closely analogous to interLATA time and weather services and interLATA directory assistance to independent telephone companies, which the BOCs are prohibited from providing under Section

II(D)(1) of the decree in the absence of a waiver. *Id.* at 19a; see *United States* v. *Western Electric Co.*, Civ. No. 82-0192 (D.D.C. Feb. 6, 1984), slip op. 6 n.9 (C.A. App. 39).

3. The court of appeals affirmed. Pet. App. 1a-10a. Petitioner argued on appeal that the interexchange portion of the proposed gateway service would not be offered "for hire"—and would not, therefore, constitute an "interexchange telecommunications service" within the meaning of the decree[4]—because the interexchange portion of the service would not be separately identified or separately charged to the customer. The court of appeals refused to accept that "strained interpretation" of the phrase "for hire," noting that this view would allow the BOCs to provide any interexchange services so long as they were packaged with some permitted service. *Id.* at 7a.

The court also rejected petitioner's claim that the district court's 1983 *Official Services* decision permitting the BOCs to provide interLATA directory assistance compelled a finding that interLATA transmission of gateway communications are not services "for hire." Pet. App. 8a-10a. The court of appeals first stated that it was not bound by the earlier decision of the district court. *Id.* at 9a. It then noted that "[i]n 1983 the district court was faced with a one-time daunting task, the allocating of existing facilities to either AT&T or the BOCs—and the court and the parties may well have preferred a measure of pragmatism to logic." *Id.* at 10a. The court of appeals did not reach the question whether the district court had in fact, as petitioner contended, intended in its 1983 *Official Services* decision to hold that directory assistance is not "for hire." *Id.* at 9a-10a & n.5.

---

[4] The decree prohibits the BOCs from providing "interexchange telecommunications services," and defines a "telecommunications service" as "the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities." Section IV(P); Pet. App. 32a.

Finally, the court of appeals acknowledged petitioner's argument that it would be prohibitively expensive to place a central processor in each LATA. That argument, it observed, may be a "powerful argument for a waiver from the terms of the decree, * * * a route appellants chose to bypass." Pet. App. 10a.

## ARGUMENT

Petitioner seeks to have this Court interpret the terms of a particular consent decree. The lower courts' construction of those terms is consistent with the language of the decree and creates no conflict with the decisions of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. A consent decree is to be construed as a contract. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236-237 (1975). Thus, the initial guide to decree construction is the language of the decree itself, as used "in its natural sense" and in relation to its normal meaning. *United States* v. *Armour & Co.*, 402 U.S. 673, 678 (1971); *ITT Continental Baking*, 420 U.S. at 236; *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 22-23 (1959).[5] Contrary to petitioner's claim (Pet. 12-14, 18-20), the courts below applied those principles of construction and properly concluded that petitioner's proposed gateway service is prohibited by the terms of the decree.

The decree prohibits the BOCs from providing "interexchange telecommunications services." Section II(D)(1); Pet. App. 28a. "Interexchange telecommunications" is defined as "telecommunications between a point or points

[5] Aids to construction of the sort properly taken into account in construing a contract, including the circumstances surrounding the formation of the decree and any technical meaning that the words used may have had to the parties, are also appropriately considered. *ITT Continental Baking*, 420 U.S. at 238; *Atlantic Refining*, 360 U.S. at 22.

located in one exchange telecommunications area and a point or points located in one or more other exhange areas." Section IV(K); Pet. App. 32a. A "telecommunications service" is defined as "the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities." Section IV(P); Pet. App. 32a. Petitioner concedes (Pet. 14) that its proposed service involves "interexchange telecommunications" since it proposes to connect callers in one LATA with a central processor in a different LATA, relying exclusively on facilities that it owns or leases. Petitioner also concedes (*ibid.*) that its gateway service is "for hire." It contends, however, that the interexchange telecommunications involved in the gateway service are not "for hire" and, therefore, that no interexchange telecommunications service is involved. The court of appeals properly rejected this "strained interpretation" of the decree. Pet. App. 7a.

The decree does not define which telecommunications services are offered "for hire." But a common-sense interpretation would include any telecommunications service that constitutes a major and essential component of a telecommunications service that is concededly "for hire," particularly where the charge for the total service varies with the duration of the component telecommunications service. The court of appeals rightly concluded that bundling the cost of the interLATA connection with the other component costs of gateway service does not render the connection to the central processor any less a service "for hire." Pet. App. 8a.[6]

Petitioner urged the courts to look beyond the "four corners" of the AT&T consent decree to the concept of common carrier status under various statutes in interpret-

---

[6] Petitioner proposed to lease, rather than construct and own, the interLATA facilities in this case. The court of appeals correctly concluded that the ownership of the facilities is not determinative. Pet. App. 8a.

ing the term "for hire." Unlike those statutes, however, the decree does not use the term "for hire" as a definition of, or in conjunction with, the term "common carrier."[7] In any event, the cases on which petitioner relies do not advance its cause. Rather, they establish that the carriage of a customer's property or communication constitutes service "for hire," regardless of the manner in which payment is received.[8]

2. Petitioner also claims that the lower courts' ruling in this case is inconsistent with the district court's 1983 *Official Services* decision, which allowed each BOC to offer local telephone directory assistance on a centralized basis, across LATA boundaries. Pet. 14, 16-18. As the court of appeals pointed out, however, even if petitioner were correct in its assertion that its service is indistinguishable from

---

[7] Petitioner's argument that some businesses make use of interexchange telecommunications and recover the costs in charges for other products without being deemed to provide interexchange telecommunications for hire (Pet. 15-16) is without force. The decree in this case restricts the conduct of AT&T and the BOCs. Its restrictions do not apply to, and were not drafted to take account of, the activities of other firms.

[8] *E.g., United States* v. *California*, 297 U.S. 175, 182-183 (1936) ("[a]s the service involves transportation of the cars and their contents, the method of fixing the charge is unimportant"); *Stimson Lumber Co.* v. *Kuykendall*, 275 U.S. 207, 210-211 (1927) ("one who undertakes for hire to transport from place to place the property of others who may choose to employ him is a common carrier"); *McCrea* v. *Harris County Houston Ship Channel Navigation District*, 423 F.2d 605, 608 (5th Cir.), cert. denied, 400 U.S. 927 (1970) ("common carrier" status depends on whether an entity is performing a part of the total rail service contracted for by a member of the public and is receiving remuneration for it in some manner).

This Court's decision in *Red Ball Motor Freight* v. *Shannon*, 377 U.S. 311 (1964), on which petitioner relies (Pet. 15-16), is inapposite. The issue in *Red Ball* was whether respondent's back-hauling of sugar constituted legitimate "private carriage" that furthered "a *noncarrier* business" or was "for-hire carriage" requiring certification from the

directory assistance, the appellate courts have not previously been presented with the issue decided by the district court in 1983 and are not bound by the district court's ruling. Pet. App. 9a, citing *Anderson* v. *Celebrezze,* 460 U.S. 780 (1983).[9]

In any event, as the district court concluded, the 1983 decision did not establish a sweeping rule that no directory-type service offered across LATA boundaries is a service for hire. The issue in *Official Services* was the proper division of the Bell System's assets between the soon-to-be-divested BOCs, which were to operate the local telephone exchanges, and AT&T, which was to retain the long distance network. Because the Bell System's network had not been designed with this divestiture in mind, the assets did not fall neatly into the two categories. In particular, networks carrying "official services" (services that "represent communications between personnel or equipment of an

---

ICC. *Id.* at 314 (emphasis added). The Court found in the legislative history of Section 203(c) of the Interstate Commerce Act, 49 U.S.C. 303(c) (1976), a congressional intent to ground this determination on the "primary business" of the carrier. 377 U.S. at 314-317. The Court ultimately concluded that Shannon's sugar hauling was not "for-hire transportation" because it was "within the scope, and in furtherance, of [its] *noncarrier* business enterprise" as a dealer in commodities. *Id.* at 319 (emphasis added). The Court also relied on the fact that Shannon's assets were not in large part composed of transportation facilities, nor was transportation a major item of expense. *Id.* at 320. The interLATA telecommunications connection that petitioner proposes to operate, on the other hand, is an integral part of a telecommunications service concededly offered "for hire" by a firm in the business of providing telecommunications services.

[9] This Court summarily affirmed the *Official Services* decision, but whether directory assistance was offered "for hire" was not raised by any of the parties on appeal and thus was not the basis of the Court's summary affirmance. As this Court stated in *Celebrezze,* "the precedential effect of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.' " 460 U.S. at 784-785 n.5.

Operating Company located in various areas and communications between Operating Companies and their customers" (Pet. App. 44a)) posed a problem because they crossed LATA boundaries. The district court decided to assign those facilities to the BOCs because it did not believe that the BOCs should be forced to rely on AT&T for services integral to local telephone service.[10] The district court also decided to allow the BOCs to continue operating the networks on a centralized basis because the alternative was to require them to reconstruct the system to set up a separate network in each LATA. *Id.* at 44a-50a.[11] This reasoning does not suggest that the district court thought it was establishing a broad rule for the future allowing the BOCs to design new networks offering new services in competitive markets on an interLATA basis without obtaining a waiver.

Subsequent events confirmed that the *Official Services* result was not intended to apply to all directory-type services. Thus, the district court ruled soon after the *Official Services* decision that even interLATA directory assistance to other independent telephone companies was not permitted under the decree in the absence of a waiver. *United States* v. *Western Electric Co.*, Civ. No. 82-0192 (D.D.C. Feb. 6, 1985), slip op. 6, n.9; C.A. App. 39.

Moreover, as the district court pointed out, the directory service at issue here is not comparable to the "white pages" directory service at issue in the *Official Services* decision. Although the proposed gateway's central proces-

---

[10] See Competitive Impact Statement, 47 Fed. Reg. 7170, 7176 n.24 (1982) ("the provision of a listing of the phone numbers and addresses of subscribers and the related directory assistance function are inherent parts of exchange telecommunications").

[11] Petitioner asserts (Pet. 16) that "all the parties to the decree" shared the view that directory assistance did not amount to an offering of long-distance service "for hire." However, none of the parties even addressed the "for hire" point. See Pet. App. 44a-45a.

sor contains what can be termed a "directory" of information service providers, it provides much more than the phone number of the ISPs. The customer interacts with the gateway, seeking information about subjects of interest, relaying further requests back to the central processor, and deciding which, if any, ISP may provide the information being sought. The gateway itself is the service the customer is hiring from the BOC; the BOC does not itself provide the services about which it provides information to the customer. White page users, on the other hand, are "hiring" local telephone service, and the directory is an incidental service provided to facilitate its use.

Accordingly, there is no inconsistency in the lower courts' refusal to extend the treatment afforded the preexisting official services network in 1983 to petitioner's proposed interLATA gateway service. The lower courts' interpretation of the decree to prohibit such service in the absence of a waiver is consistent with the language of the decree.[12] In these circumstances, there is no need for review by this Court.

---

[12] Petitioner asserts that the decision below impairs its ability to provide consumers with low-cost gateway services. Pet. 18. But the prohibition of Section II(D)(1) is unconditional; it makes no exception for "lost efficiencies." And when the district court modified the decree to permit the BOCs to offer gateway services, it explained that the BOCs would have flexibility to design and create an information service network *only* "[i]nsofar as this goal is attainable without interfering with the core decree restrictions" (714 F. Supp. at 12 n.42) and *only* to the extent that specific restrictions and conditions are observed (*id.* at 12). Moreover, if petitioner can show that its proposed gateway architecture would not afford it the opportunity to use its local telephone monopoly to impede competition in the interexchange market, it can obtain a waiver under Section VIII(C) of the decree. See note 1, *supra*.

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**
JAMES F. RILL
*Assistant Attorney General*
ALISON L. SMITH
*Deputy Assistant Attorney General*
CATHERINE G. O'SULLIVAN
ANDREA LIMMER
*Attorneys*

JANUARY 1990

* The Solicitor General is disqualified in this case.

U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20329